In the

Supreme Court of the United States

OCTOBER TERM, 1900.

No. 1900.

WILLIAM HENRY BALDWIN, [illegible] SHEFFIELD BALDWIN,

Plaintiffs in Error,

vs.

THE STATE OF MARYLAND, to the use of D. FRANK HULL, Collector of State and County Taxes for Washington County, Maryland,

Defendant in Error.

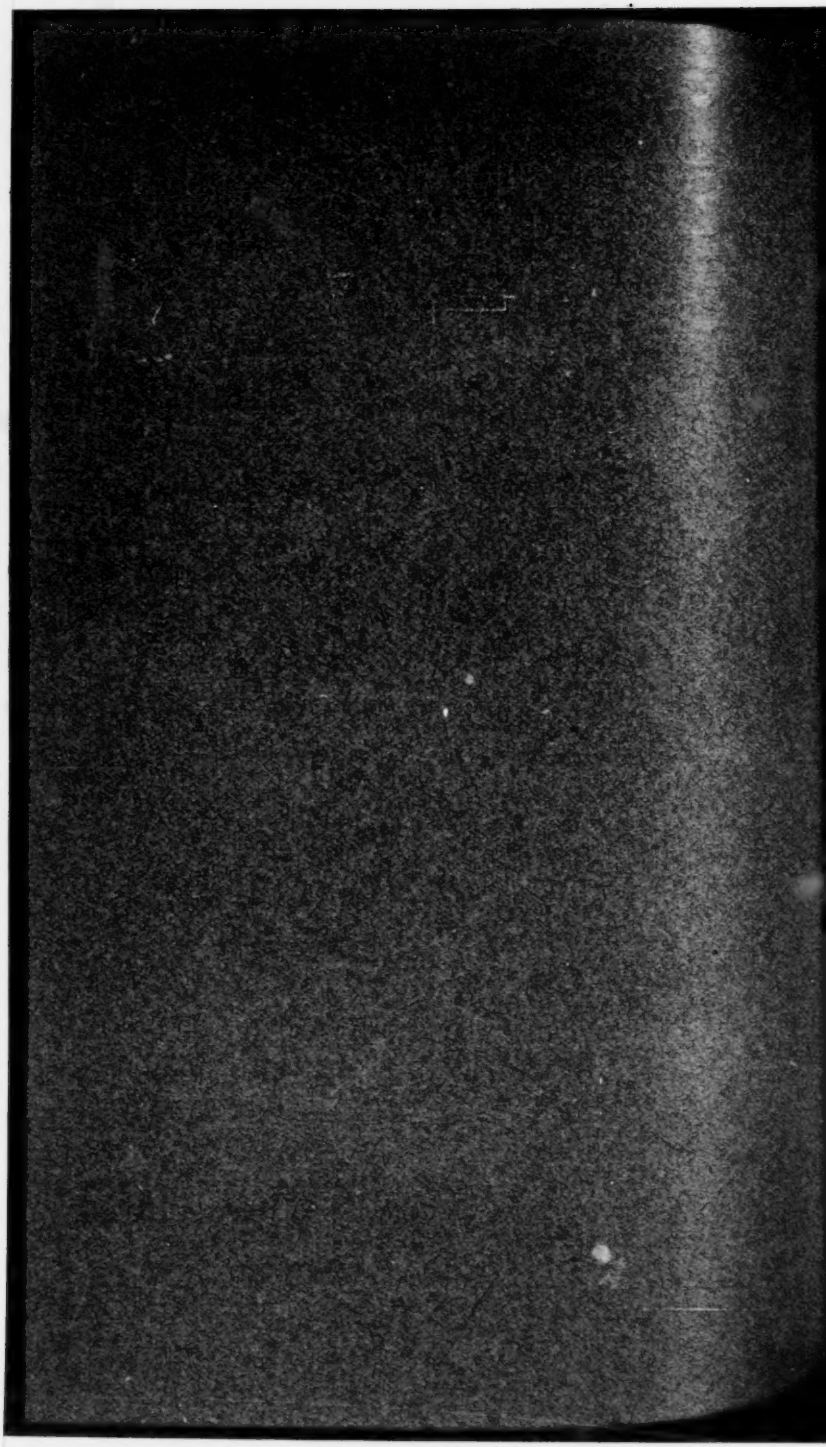
In Error to the Court of Appeals of the State of Maryland.

Brief for Plaintiffs in Error

in opposition to motion to dismiss for want of jurisdiction.

CHARLES A. BOSTON,

Counsel for Plaintiffs in Error.



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Supreme Court of the United States.

OCTOBER TERM, 1899.

No. 367.

WM. HENRY BALDWIN, JR., AND SUMMERFIELD BALDWIN, PLAINTIFFS IN ERROR,

vs.

THE STATE OF MARYLAND, TO THE USE OF D. FRANK HULL, COLLECTOR OF STATE AND COUNTY TAXES FOR WASHINGTON COUNTY, MARYLAND, DEFENDANT IN ERROR.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

Brief for Plaintiffs in Error in Opposition to Motion to Dismiss for Want of Jurisdiction.

Correction.

We correct one statement of fact in the brief of the counsel for defendants in error (p. 2). There is no justification in the record for the averment that *prior* to 1893 the Register of Wills made annual returns, and that taxes were levied upon those returns and duly paid up to the year 1893. The record is absolutely silent on this point.

Statement.

The judgment which the plaintiffs in error seek to review, is a judgment against the bondsmen of a guardian requiring them to pay taxes in the State of Maryland, which their principal has not paid.

The principal was not a party to the suit, and the suit was not founded upon any judgment for the taxes, but merely upon the allegation in the declaration that the taxes were duly levied and assessed, and that the guardian had not paid them (printed record, p. 6). The bondsmen, therefore, were at liberty to contest and did contest the validity of the taxes.

The reason the payment of the taxes is opposed is that they were levied by the State of Maryland *upon absent property of a non-resident and absent adult.* The State has not jurisdiction of the owner, nor of the property, and has no means of collecting its exactions, except by enforcing the collection from residents of the State who happen to have given bond to the State for the faithful performance of the lawful duties of a non-resident guardian appointed, for the owner of the property while an infant, by a Court of the State during the infancy of the owner. The State being powerless to collect the tax by any ordinary method sues the guardian's bondsmen. The taxes were not levied during the infancy of the owner, but after he became an adult, there was no actual notice to him nor to his guardian, the property was all out of the State, the owner resided in New York, the guardian resided in New York, the property consisted of stocks and bonds of corporations organized and existing outside of the State of Maryland, and the bonds and the certificates of stock were physically located in New York (printed record, p. 16).

The State of Maryland claims the right to tax because of the following facts: Originally and before its removal from the State, the property had belonged

to two residents, upon whose death it devolved upon the infant; the latter was and continued always thereafter to be a citizen and resident of New York. Under the law of Maryland a guardian was appointed for the infant to receive the property from the administrators of the decedents. This guardian and a successor in office were relieved of their duties, and finally William Woodward Baldwin, a citizen and resident of New York, was appointed guardian for the infant. He gave bond in the usual form (Printed Record, p. 17), conditioned upon the performance of his lawful duties as guardian, and took the property for safekeeping into his custody, and, it being portable, he removed it from Maryland into New York. Subsequently the infant arrived at full age, and under an agreement between the guardian and the ward the guardian continued to manage the property. After the levy of the taxes now sued for, the guardian stated a final account with his ward in the court of his appointment and was discharged (Printed Record, p. 16).

The Court of Appeals of Maryland has sustained the power of the State to levy and collect the taxes upon the proposition expressed in its opinion (on printed p. 47) in the following words: "In contemplation of law, the personal property remains in the county where the guardian was appointed."

We combat this proposition and maintain that no fiction enacted by a Legislature or invented by a Court can give a State power to tax absent property of a non-resident owner. We have insisted that the collection of these taxes from the plaintiffs in error is a violation of rights secured to them by the Constitution of the United States.

We do not conceive that, upon this motion, it is necessary or permissible to discuss whether the Court of Appeals of Maryland is right in its position on the federal question, or whether we are correct in the views that we respectfully hold.

The assignment of errors is sufficient to raise the Federal questions in this Court.

Assignment of Errors—Now Relied On.

1. " That the law of the State of Maryland whereby and whereunder the taxes described in the record and proceedings were levied and assessed, as expounded by the judgment of the Court of Appeals of Maryland, is in conflict with the fourteenth (14) amendment of the Constitution of the United States, inasmuch as said law so expounded abridges the privileges and immunities of citizens of the United States—to wit, the privileges and immunities of the appellants and of William Woodward Baldwin and Columbus Calvert Baldwin, and of each of them, severally citizens of the United States, contrary to said Fourteenth Amendment of the Constitution of the United States."

2. " That the law of the State of Maryland whereby and whereunder the said alleged taxes were levied and assessed, as expounded by the judgment of the Court of Appeals of Maryland, is in conflict with the fourteenth amendment of the Constitution of the United States, inasmuch as said law so expounded deprives the said appellants and the said William Woodward Baldwin and Columbus Calvert Baldwin, severally citizens of the United States and within its jurisdiction, and each of them, of property without due process of law, and contrary to the fourteenth amendment of the Constitution of the United States."

3. " That the law of the State of Maryland whereby and whereunder the said alleged taxes were levied and assessed, as expounded by the judgment of the Court of Appeals of Maryland, is in conflict with the fourteenth amendment of the Constitution of the United States, inasmuch as said law so expounded denies to the appellants and to William Woodward Baldwin and Columbus Calvert Baldwin, and to each of them, within the jurisdiction of the State of Maryland, the equal protection of the laws."

4. "That the law of the State of Maryland, whereby and whereunder the alleged returns of the register of wills of Washington county, described in the record and proceedings, were directed to be made, and were made, as expounded by the judgment of the Court of Appeals of Maryland, is in conflict with Article 4, Section 2, of the Constitution of the United States, inasmuch as said law so expounded denies to William Woodward Baldwin and Columbus Calvert Baldwin, and each of them, severally citizens of the United States and of the State of New York, the privileges and immunities of citizens of the State of Maryland."

5. "That the law of the State of Maryland, whereby and whereunder the said alleged returns of the register of Wills of Washington county aforesaid were directed to be made and were made, as expounded by the judgment of the Court of Appeals of Maryland, is in conflict with the fourteenth amendment to the Constitution of the United States, inasmuch as said law so expounded deprives the appellants and each of them, and the said William Woodward Baldwin and Columbus Calvert Baldwin, severally citizens of the United States and within its jurisdiction, of property without due process of law."

6. "That by the record and proceedings aforesaid it appears that the judgment aforesaid was given for the appellee against the appellants;

"Whereas, by the supreme law of the land, as embodied in the Constitution of the United States, the said judgment ought to have been given for the said appellants against the appellee."

POINTS.

THE MOTION SHOULD BE DENIED.

The plaintiffs in error maintain:

I. That the questions presented by the assignment of errors are open for determination.

II. That a Federal question was involved, was specially presented by them for decision to both Courts below, was necessary to the determination of the case, and was considered and determined adversely.

III. That this Court has jurisdiction, and should therefore dismiss the motion.

STATUTE LAW OF MARYLAND.

The tax law involved is as follows:
Code of Public General Laws, Art. 81:

> SEC. 9. "The *several registers of Wills* in this State *shall annually*, on or before the first day of March, *return to the county commissioners* or appeal tax court *a summary account of all property* that shall appear by the records of the several orphans' courts to be *in the hands of each* executor, administrator or *guardian* as such; and all such property, if not before assessed, shall then be assessed; [and every executor, administrator or guardian shall be liable to pay the taxes levied thereon, and shall be allowed therefor by the orphans' court in his accounts."
>
> SEC. 65. "Administrators shall pay all taxes due from their decedents as preferred debts, and to the exclusion of all others, except the necessary funeral expenses; and on failure, their bonds shall be put in suit for the use of the State, and re-

covery had for the whole amount of taxes due, and interest from the time they were payable; this section shall also apply to guardians for taxes upon property in their hands as such."

The appointment of the guardian was under Maryland Code of Public General Laws, Art. 81, Sec. 203:

"In case any non-resident infant shall be entitled to any property, real or personal, in this State, and shall have no guardian or guardians in the place of the residence of the said infant, duly qualified, and who shall have given bond with sufficient security for the performance of his trust, it shall be lawful for the orphans' court of the city or county in which the said property of the said infant may be, or where the debt or chose in action due to the said infant may be recoverable, to appoint a guardian or guardians over the property or claim of such infant, which said guardian or guardians shall give bond with security in the same manner as if such infant resided in this State."

The bond was given pursuant to Article 93, Code Public General Laws, Section 155:

"Every guardian appointed by the court, and every guardian by will, or natural guardian, before he proceeds to act as such, shall enter into bond to the State of Maryland in such penalties and with such sureties as the court shall approve, and to be recorded and be subject to be put in suit, and to be in all respects on a footing with an administration bond, with the following condition:

"'The condition of the above obligation is such, that if the above bounden , as guardian to , of county, shall faithfully account with the Orphans' Court of county, as directed by law, for the

management of the property and estate of the infant under his care, and shall also deliver up the said property agreeably to the order of the said court or the directions of law, and shall in all respects perform the duty of guardian to the said according to law, then the above obligation shall cease; it shall otherwise remain in full force and virtue in law; and the said bond shall be liable for the proceeds of sales of the real estate of his ward which shall come into his possion as well as for other property."

I.

THE QUESTIONS PRESENTED BY THE ASSIGNMENTS OF ERROR ARE OPEN FOR DETERMINATION.

The learned counsel for the defendant in error falls into the same inaccuracy respecting the previous adjudication of this same case as he does respecting the biblical allusion by which he illustrates his point.

He has wrongfully attributed to "the judicial Abraham" a dictum which the sacred writer ascribes to Isaac (Genesis c. 27, v. 22) and with the same disregard of identity he refers to a previous controversy between different parties, as a determination of this case. In the former cause of which he speaks, neither the State of Maryland, nor William H. Baldwin, Jr., nor Summerfield Baldwin (the only parties to the present action), were parties; it is therefore not *res judicata* with respect to this contest, and the Court below has not so adjudged it nor so treated it. It was a case between different parties respecting a part only of the same taxes, and arose in a different tribunal and in a different way and for a different purpose. In the former suit there was no attempt to collect the taxes and

there was no adjudication that they were due or collectible. The non-resident guardian, learning that D. Frank Hull, or the County Commissioners of Washington County, were about to take some steps to collect a part of these taxes, filed a bill in equity (Printed Record, p. 27), wherein he prayed the Court merely that "the said County Commissioners of Washington County, and the said D. Frank Hull, collector as aforesaid, and each of them, may be enjoined and restrained from enforcing the collection of said taxes, and from taking any further proceedings at law for the collection of the same," and that it grant "the writ of injunction against the said County Commissioners of Washington County, and against the said D. Frank Hull, strictly prohibiting and restraining them, and each of them, from taking any or further proceedings for the collection of said taxes from the said William W. Baldwin, guardian of Columbus C. Baldwin."

The judgment in the said former suit was "that the bill of complaint in the above cause be and the same is hereby dismissed with costs" (Printed Record, p. 37). When the former suit came before this Court on writ of error, it was dismissed because no Federal question was specifically raised and because the decision of a question not Federal was sufficient to sustain the judgment (Baldwin, Guardian, agst. County Commissioners, 168 U. S., 705). The question not Federal which was determined was that "the guardian's own laches in respect to his duty cannot be made the basis of equitable correction on his own behalf" (STAKE, Equity Judge, Printed Record, p. 37). The same proposition was stated by the Court of Appeals of Maryland in its opinion in the former suit, as follows: "He could not remain passive until the authorities were about to enforce collection of taxes and then seek the aid of a court of equity" (Baldwin, Guardian, vs. County Commissioners, 85 Md., at p. 164).

It is demonstrated, therefore, that the former suit was between Baldwin, guardian, and the County Com-

missioners and the Collector of Taxes ; that the present suit is between the State of Maryland, the obligee of the guardian's bond, and Baldwin's sureties ; that in the former suit Baldwin was plaintiff and the officials were not moving against him ; that in the present suit the State is plaintiff and is seeking to enforce the payment of taxes ; that the former suit was entirely a suit for the restraint of the County Commissioners and Hull ; that the present suit is not a proceeding by Hull nor the County Commissioners (Opinion, Printed Record, pp. 43-45) ; that the former suit was in equity for an injunction only ; that the present suit is at law for the collection of money ; that relief in the former suit was denied in equity for laches of the suitor ; that in the present suit the sureties rely upon no equitable considerations, but depend absolutely upon their legal rights.

The former judgment therefore does not contain a single element entitling it to the force of *res judicata*. The Court of Appeals of Maryland has said : " The first question to be considered is whether the defendants, who are sureties on the bond, are responsible, *even conceding their principal to be so*. It will be admitted at the beginning of the discussion that it does not necessarily follow that sureties on a guardian's bond are liable because the Guardian is " (Opinion, Printed Record, p. 40).

The Court of Appeals, therefore, did not regard this question as *res judicata*, and its reference to its former opinion (which, it will be noted, is no part of the record) was simply for the purpose of avoiding the second discussion of a question of law, which it had so recently determined. Of course, the principle *stare decisis* would dictate that disposition of the question, but the fact that the former decision happened to be in a cause arising out of a part of the same taxes made it no more pertinent nor binding between the parties than if it had been rendered in any other cause involving the same principles of law. And no mere pre-

cedent of its own can justify the Court of Appeals in denying rights secured by the Constitution of the United States.

We have felt it incumbent upon us to explain what counsel for the defendant in error means when he refers to no federal question having been presented which had not been previously determined in the *same case*. The case is *not* the same case, and this Court has already judicially determined (168 U. S., 705) that *no* federal question was presented. His Point 1 is, therefore, entirely without merit, as is also his Point 5, which is substantially a reiteration of his Point 1.

II.

A FEDERAL QUESTION WAS INVOLVED; WAS PRESENTED FOR DECISION BY THE PLAINTIFFS IN ERROR TO BOTH COURTS BELOW; WAS NECESSARY TO THE DETERMINATION; WAS CONSIDERED, AND WAS DETERMINED ADVERSELY TO THE RIGHT, PRIVILEGE AND IMMUNITY SPECIALLY SET UP BY THE PLAINTIFFS IN ERROR UNDER THE FEDERAL CONSTITUTION.

A. THERE WAS A FEDERAL QUESTION.

This Court has repeatedly denied the power of a State to tax the absent property of non-residents.

The leading cases are:

NORTHERN CENTRAL RAILWAY CO. VS. JACKSON, 7 WALL., 262: Here the Northern Central Railway Co. sought to withhold from a bondholder a tax imposed by the State of Pennsylvania upon the coupons attached to the bonds and directed by the law of Pennsylvania to be deducted by the railway company from interest payments; the bonds were issued upon the credit of the line of road, partly in Maryland and partly in Pennsylvania; a portion of the pledged property lay in Maryland. NELSON, J., delivering the opinion of the Court, said:

> "Now, it is apparent, if the State of Pennsylvania is at liberty to tax these bonds, that, to the extent of this Maryland portion of the road, she is taxing property and interests beyond her jurisdiction; * * * to permit the deduction of the tax from the coupons in question would be giving effect to the acts of the Legislature of Pennsylvania upon property and interests lying beyond her jurisdiction."

CLEVELAND, PAINESVILLE AND ASHTABULA R. R. Co. vs. COMMONWEALTH OF PENNSYLVANIA, 15 Wall., 30 (State tax on foreign-held bonds): Here the railroad company, a corporation of Pennsylvania, and subject to its tax laws, was directed to deduct from interest payments on its bonds held and owned by non-residents, a tax assessed and levied upon the principal of the bonds by the State of Pennsylvania. The Court, FIELD, J., criticised the language of NELSON, J., in the last case cited above, but affirmed the principle of the decision, using the following words:

> "It was the fact that the *bonds were held by a non-resident*, which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. *Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.* The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume—whether

as duties, imposts, excises or licenses—it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape—in its natural condition, in its manufactured form and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce in manufacture and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State, as to the mode, form and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction."

From the foregoing opinion it is clear that person, property or business within the State are jurisdictional facts, and that no tax can be laid where the presence of one or the other cannot be predicated. Applying the principles to the facts of the case, the Court said:

"We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State."

NEW YORK, LAKE ERIE AND WESTERN R. R. Co. vs. COMMONWEALTH OF PENNSYLVANIA, 153 U. S., 628: Here the State of Pennsylvania sought to collect from a New York corporation taxes on bonds of the corporation held and owned by residents of Pennsylvania. The same general principle is enunciated again by the Court, through HARLAN, J., in these words:

"No principle is better settled than that the power of a State, even its power of taxation in

respect to property, is limited to such as is within its jurisdiction."

The same principles are stated in Tappan vs. Merchants' Bank, 19 Wall., 490; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S,, at p. 208, and City of New Orleans vs. Stemple, Advance sheets U. S. Supreme Court, decided December 4, 1899.

This Court has also denied the power of a State to impose a personal liability for taxes upon a non-resident. Section 65 of the tax law attempted this.

See Dewey vs. Des Moines, 173 U. S., 193.

The plaintiffs in error vehemently contended that the exercise of the power through the tax laws in this case violated several provisions of the Federal Contitution, and this surely presented a Federal question.

B. THE FEDERAL QUESTION WAS ACTUALLY PRESENTED.

One cause of complaint by the defendants in error is, that it is presented in so many guises.

It is distinctly and specifically raised in no uncertain terms by

Pleas 13, 14, 15, 16, 17 (Printed Record, p. 9).
Additional Pleas, 19, 20, 21, 22, 23 (Printed Record, p. 14).
Bills of Exception 3d, 4th, 5th (Printed Record, p. 19-21).
Prayers 10, 11, 12, 13, 14, 15 (Printed Record, p. 23, 24).
Motion in Arrest of Judgment, 3d ground (Printed Record, p. 25).

C. THE FEDERAL QUESTION WAS NECESSARY TO THE DETERMINATION.

The declaration (Printed Record, p. 7) alleged that the taxes in suit were *duly levied and assessed;* that it was the guardian's duty to pay all State and county taxes *properly levied and assessed;* that the bondsmen bound themselves for the full and faithful performance

of all the duties imposed upon him by the *laws* of the State of Maryland, including the specific duty to pay taxes, and that he refuses to pay the said taxes.

The pleas set up the unconstitutionality under the Federal Constitution of the law of the State of Maryland under which the taxes were levied and assessed, in that it abridged the privilieges and immunities of citizens of the United States, and that it deprived citizens of the United States of property without due process of law, and that it denied to the defendants within the jurisdiction of the State of Maryland the equal protection of the laws, and that the law of said State regulating the returns of the Register of Wills on which the taxes were based, denied to citizens of the United States and of New York the privileges and immunities of citizens of Maryland, and deprived citizens of the United States of property without due process of law.

These pleas were demurred to (Printed Record, p. 11) and the demurrers sustained.

The defendants pleaded over, under leave of Court in different form, but the same substance and the plaintiff moved to strike the new pleas from the record. Its motion was granted (Printed Record, pp. 13, 14).

The defendants objected to the admission of evidence of the returns and taxes on substantially the same grounds, and the evidence was admitted and the defendants excepted (Printed Record, 19, 20, 21).

The defendants prayed for instructions on the law to substantially the same effect, and the prayers were rejected (Printed Record, p. 23) [as printed the prayers refer to the fifth prayer, whereas they should refer to the tenth prayer; this was a typographical error and was cured by the agreement of counsel to that effect (Printed Record, p. 38)].

The defendants moved in arrest of judgment on substantially the same grounds and the motion was denied (Printed Record, p. 25).

The defendant's counsel were criticised for raising the questions in so many ways. It would be farcical to say that these questions, so specifically presented and so consistently overruled, were not considered. It also passes the bounds of reason to conclude that these questions were not necessary to the determination; they were necessary to each determination that was made thereon in the course of the trial, and if any one of these propositions was sound it necessarily followed that the taxes were levied without warrant of law and were void, and that no cause of action therefor existed in favor of the State nor against the defendants.

We contend that, as the scheme devised by the Maryland law for the collection of taxes on the non-resident ward's estate was to levy the taxes on the absent property and then impose the liability to pay them on the guardian, at the same time reserving to him the right to reimburse himself out of his ward's property, this scheme was an unconstitutional method of enforcing payment of taxes out of the ward's estate; that the law directing it was unconstitutional, and could, therefore, impose no such liability on the guardian, and compliance with the law was no part of the guardian's lawful duty, and, therefore, no part of the bondsmen's undertaking, and that the unconstitutionality of the law can be urged as a defense, alike by ward, guardian and sureties; and that the sureties are as much entitled to raise the question and have it determined on its constitutional merits as the ward or guardian would be.

The defendants' undertaking was that the guardian should in all respects perform the duty of guardian according to *law* (Printed Record, p. 17).

See Wood vs. Fisk, 63 N. Y., 245.

The bondsmen have not been held to have contracted that the guardian would do anything that the Legislature might arbitrarily direct; they did not

contract that he would comply with everything having the form of law, but merely with everything having the force of law. And the Court of Appeals has not differently construed their contract.

The whole substantial question was whether the *law* imposed the duty, and that necessarily involved the determination that it was a valid law when its validity was so vehemently disputed. There could not possibly be any recovery under the declaration unless there was a valid tax, duly levied and assessed, under a valid law; and there was a verdict and judgment for the plaintiff (Printed Record, p. 14).

It is true that there were other questions raised such as no undertaking to pay taxes, limitations, and release and discharge, but the main question which was absolutely necessary to the foundation of the judgment was whether there was a valid tax duly levied and assessed under a valid law. Until this was determined in favor of the plaintiff, there was no need of discussing the other defenses, which consisted of matter of avoidance.

The defendants pleaded the constitutional rights secured to them and also to their principal; this was entirely permissible.

Hughart vs. Spratt, 78 Ky., 313.
Pillman vs. Schuyler, 4 Hun, 166.
Osborn vs. Roberts, 36 N. Y., 365.
Morse vs. Hovey, 9 Paige, 197.
Parshall vs. Lamoreaux, 37 Barb., 189.
Sawyer vs. Chambers, 43 Barb., 622.

The State had never established its right against the guardian, the state was no party to the former suit and was not bound thereby, a judgment in favor of the guardian in the former suit would not have prevented the state from suing as obligee of the bond, it was therefore open to the bondsmen to contest the guardian's liability, and to deny the validity of the law under which the state claimed the right.

D. THE FEDERAL QUESTION WAS CONSIDERED.

We have already shown that there was no way to avoid its consideration. The rulings on it presentation are each evidence of its consideration.

Counsel for the defendant in error shows on page 5 of his brief by his discussion under "4," that the question was considered below.

The Court of Appeals says: "The only other question that we need refer to, is the constitutionality of the tax, thus, levied on the property" (Printed record, p. 46). "We of course, do not question the decisions of the Supreme Court of the United States, cited by the appellant, as to the right of a State to tax property outside of the limits when the owner is beyond its jurisdiction, but we do not deem them applicable to this case" (Printed Record, p. 47).

The fact that the Court of Appeals did not deem that the cases cited were applicable to the case was merely an adverse determination of our contention that they were applicable. It should not preclude us from examining into whether they were right.

These quotations from the opinion show that the Court actually considered and passed adversely on the constitutional questions.

The ground of the Court's determination, as stated in the opinion, that they would not enter into an extended discussion of the constitutional questions attempted to be raised, because they had recently determined that the *situs* of the property was in Washington County (Printed Record, pp. 45, 47), and had no reason to change their views, was a determination of law and not of fact. They refer to their opinion in the case of Baldwin vs. County Commissioners, 85 Md., 145, as an expression of their present views. In that case they said (p. 155) that both guardian and ward were non-residents at the time of the levy and asment; that the property consisted of stocks and bonds of corporations organized and located outside of the State of Maryland, and that

the *situs* of property of this kind, for the purposes of taxation, is ordinarily at the domicile of the owner, but that the Legislature has the power to fix a different *situs*, provided, of course, there be no conflict with some provision of the Constitution (p. 156). They now have had their attention called specifically to the provisions of the Constitution, and they state that they have no reason to change their views. This certainly shows that they considered the constitutional questions.

In STATE TAX ON FOREIGN BONDS, 15 Wall., 300, the Supreme Court of Pennsylvania had determined that the *situs* of the property for the purposes of taxation was in Pennsylvania, but that did not prevent this Court from determining that it was not; the question of *situs* on undisputed facts was one of law and not of fact (See opinion of Mr. Justice FIELD, pp. 321 and 322).

E. THE FEDERAL QUESTION WAS DETERMINED ADVERSELY TO THE RIGHT, PRIVILEGE AND IMMUNITY SPECIALLY SET UP BY THE PLAINTIFFS IN ERROR UNDER THE FEDERAL CONSTITUTION.

This follows from C above. The Trial Court overruled every objection interposed on constitutional grounds, and the Court of Appeals decided that the Legislature had the power, notwithstanding these constitutional questions, to tax the property in question, though actually absent from the State, because the Legislature had given it an artificial *situs*.

The two cases of Baldwin vs. County Commissioners and State vs. Baldwin are without precedent, and they certainly determine that if property devolves on an infant non-resident the State continues to have a vested right, indefeasible without its consent, to tax the infant's property during his minority and after his majority until his guardian settles a final account, though the property be located outside of the State, and this because, for purposes of taxation, a State

Legislature may fix an artificial *situs* for the non-resident infant's property and may, for taxation, regard the infant's guardian as an artificial being residing at the place of his appointment, and may impose a personal liability on him for taxes though his actual residence be outside the State.

After reading the two opinions of the Court of Appeals it cannot reasonably be contended that the determination of this present cause involved simply a question of State law. The issue of unconstitutionality was squarely presented and it was squarely decided.

III.

THIS COURT HAS JURISDICTION, AND SHOULD DISMISS THE MOTION.

This follows from Points I. and II.

Respectfully submitted,

CHARLES A. BOSTON,

Counsel for Plaintiff in Error.

Supreme Court, U.S.
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JAMES H. MCKENNEY,
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No. 113.

Bf. of Boston for P. E.

Supreme Court of the United States.

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CHARLES A. BOSTON,
Counsel for Plaintiffs in Error.

G. G. Shipperlee, Printer and Custom Binder, Washington, D. C.

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IN ERROR TO THE COURT OF APPEALS OF THE STATE OF MARYLAND.

BRIEF FOR PLAINTIFFS IN ERROR.

Statement.

This writ of error presents the question whether the State of Maryland can constitutionally tax the absent property of a non-resident adult, and collect the tax by the present suit.

The facts were all agreed on by the attorneys for the parties (Printed Record, pp. 15, 17, and Exhibit 1, p. 27).

In short, the case is as follows: Two certain residents of Washington County, Maryland, died prior to 1880 leaving personal property which devolved on one Columbus C. Baldwin, a citizen and resident of New York, and a non-resident of Maryland, who, in 1880, was an infant. The property was distributed to a guardian of the estate of said infant, appointed to receive it by the Orphans' Court of Washington County in Maryland. In August, 1891, one William Woodward Baldwin, a citizen and resident of New York and a non-resident of Maryland, was appointed by said Orphans' Court the guardian of the said estate of said infant, and gave bond *to perform the duty of guardian to said Columbus C. Baldwin according to law* (Exh. 2, Record, p. 17), and entered upon the performance of his said duties. He received the property, consisting wholly of stocks and bonds of corporations organized and located outside of the State of Maryland; took the certificates of stock and the bonds into his custody, and removed them from Maryland into New York, the residence of himself and his ward. His ward arrived at the full age of 21 years on the 6th day of January, 1893, and authorized the said William Woodward Baldwin to continue the collection of his income and the management of his estate. At this time and at all times subsequently-including those covered by this suit, the property, consisting of stocks and bonds of corporations foreign to the State of Maryland, was physically (the certificates of stock and the bonds) located in New York and not in Maryland, and both Columbus C. Baldwin and William Woodward Baldwin were citizens and residents of New York and non-residents of Maryland. In the years 1893, 1894 and 1895, subsequent to the arrival of Columbus C. Baldwin at full age, the State of Maryland levied and assessed State and county taxes on said property. There being no property in the State out of which the taxes could be collected, and no person in the State directly responsible, the State, through its

tax collector, one Hull, undertook to collect the taxes by suing in its own name to the use of Hull the bondsmen of Wm. Woodward Baldwin.

The bondsmen defended on the ground that the laws of Maryland by virtue of which the said property was levied and assessed were unconstitutional and void under the Federal Constitution, alleging that they deprived them, and those for whom they stood sureties, of property without due process of law; that they deprived them of the privileges and immunities of citizens of the United States, and that they deprived them of the equal protection of the laws.

These defenses were appropriately raised at every stage of the suit distinctly. They were embraced in pleas, specific objections to the admission of evidence and exceptions, prayers and motion in arrest of judgment (see our brief in opposition to motion to dismiss, p. 14). The defenses were uniformly overruled and judgment for the amount of the taxes, with interest and costs, was given against the bondsmen, who appealed to the Court of Appeals of Maryland, where the judgment of the trial Court was affirmed. The bondsmen now bring this writ of error and present the Federal questions here.

The Court of Appeals of Maryland, in its opinion (Printed Record, p. 39), justified the judgment distinctly on the ground that under the statutes of the State the *situs* of the property was in Washington County, Maryland, and absence of the property from the State and non-residence of both guardian and ward did not relieve the guardian from payment of taxes, though the ward was of full age when they were levied and assessed.

The defendant in error has moved to dismiss the writ of error, and briefs on the motion have heretofore been submitted by counsel for both parties. The Court has considered the motion and has postponed its further consideration to the argument on the merits. Argument on the jurisdiction of this Court will be

found in the said brief for the plaintiffs in error in opposition to said motion.

[This case was No. 367, October Term, 1899, and the former brief is so numbered.]

ASSIGNMENT OF ERRORS--NOW RELIED ON.

In our brief in opposition to the motion to dismiss, at page 4, to which we refer, we set these forth at length. We now rely especially on the following:

> 2. "That the law of the State of Maryland whereby and whereunder the said alleged taxes were levied and assessed, as expounded by the judgment of the Court of Appeals of Maryland, is in conflict with the fourteenth amendment of the Constitution of the United States, inasmuch as said law so expounded deprives the said appellants and the said William Woodward Baldwin and Columbus Calvert Baldwin, severally citizens of the United States and within its jurisdiction, and each of them, of property without due process of law, and contrary to the fourteenth amendment of the Constitution of the United States."
>
> 5. "That the law of the State of Maryland, whereby and whereunder the said alleged returns of the register of Wills of Washington county aforesaid were directed to be made and were made, as expounded by the judgment of the Court of Appeals of Maryland, is in conflict with the fourteenth amendment to the Constitution of the United States, inasmuch as said law so expounded deprives the appellants and each of them, and the said William Woodward Baldwin and Columbus Calvert Baldwin, severally citizens of the United States and within its jurisdiction, of property without due process of law."
>
> 6. "That by the record and proceedings aforesaid it appears that the judgment aforesaid was given for the appellee against the appellants;

"Whereas, by the supreme law of the land, as embodied in the Constitution of the United States, the said judgment ought to have been given for the said appellants against the appellee."

POINTS.

In the brief already submitted for the plaintiffs in error in opposition to the motion to dismiss, the following propositions are fully argued, and reference is hereby made to the said brief, which we understand will be considered on this argument:

The plaintiffs in error maintain:

I. That the questions presented by the assignment of errors are open for determination.

II. That a Federal question was involved, was specially presented by them for decision to both Courts below, was necessary to the determination of the case, and was considered and determined adversely.

III. That this Court has jurisdiction, and should therefore dismiss the motion.

We now present the additional proposition that

IV. THE LAWS OF THE STATE OF MARYLAND AUTHORIZING AND DIRECTING THE LEVY AND ASSESSMENT OF THESE TAXES ARE UNCONSTITUTIONAL AND VOID BY REASON OF CONFLICT WITH THE CONSTITUTION OF THE UNITED STATES; IT WAS NOT THE LAWFUL DUTY OF WILLIAM WOODWARD BALDWIN TO PAY THE UNCONSTITUTIONAL TAXES; HIS BONDSMEN DID NOT UNDERTAKE THAT HE SHOULD PAY THEM, AND THE ENFORCEMENT OF THE COLLEC-

TION FROM THE BONDSMEN WAS A VIOLATION OF RIGHTS SECURED TO THEM BY THE FEDERAL CONSTITUTION.

It will be noted that this is a direct attempt to collect the taxes from the bondsmen, that no previous adjudication for their collection has been obtained against guardian or ward, that no property has been levied on, and that the sole ground of recovery is that it was the lawful duty of the non-resident guardian appointed for an infant by a local Court to pay taxes on absent property of his non-resident ward after the ward's arrival at full age, and that the bondsmen are responsible for their absent principal, against whom, in his residence, no process of the State could run. It will also be noted that no actual notice of the levy and assessment was given, and that no actual notice was required or provided by the law of Maryland.

STATUTE LAW OF MARYLAND.

The tax law involved is as follows :
Code of Public General Laws, Art. 81 :

SEC. 9. "The *several registers of Wills* in this State *shall annually*, on or before the first day of March, *return to the county commissioners* or appeal tax court *a summary account of all property* that shall appear by the records of the several orphans' courts to be *in the hands of each* executor, administrator or *guardian* as such ; and all such property, if not before assessed, shall then be assessed ; and every executor, administrator or guardian shall be liable to pay the taxes levied thereon, and shall be allowed therefor by the orphans' court in his accounts."

SEC. 65. "Administrators shall pay all taxes due from their decedents as preferred debts, and to the exclusion of all others, except the necessary funeral expenses ; and, on failure, their bonds shall

be put in suit for the use of the State, and recovery had for the whole amount of taxes due, and interest from the time they were payable; this section shall also apply to guardians for taxes upon property in their hands as such."

The appointment of the guardian was under Maryland Code of Public General Laws, Art. 81, Sec. 203:

"In case any non-resident infant shall be entitled to any property, real or personal, in this State, and shall have no guardian or guardians in the place of the residence of the said infant, duly qualified and who shall have given bond with sufficient security for the performance of his trust, it shall be lawful for the orphans' court of the city or county in which the said property of the said infant may be, or where the debt or chose in action due to the said infant may be recoverable, to appoint a guardian or guardians over the property or claim of such infant, which said guardian or guardians shall give bond with security in the same manner as if such infant resided in this State."

The bond was given pursuant to Article 93, Code Public General Laws, Section 155:

"Every guardian appointed by the court, and every guardian by will, or natural guardian, before he proceeds to act as such, shall enter into bond to the State of Maryland in such penalties and with such sureties as the court shall approve, and to be recorded and be subject to be put in suit, and to be in all respects on a footing with an administration bond, with the following condition:

" 'The condition of the above obligation is such, that if the above bounden , as guardian to , of county,

shall faithfully account with the Orphans' Court of county, as directed by law, for the management of the property and estate of the infant under his care, and shall also deliver up the said property agreeably to the order of the said court or the directions of law, and shall in all respects perform the duty of guardian to the said according to law, then the above obligation shall cease; it shall otherwise remain in full force and virtue in law;' and the said bond shall be liable for the proceeds of sales of the real estate of his ward which shall come into his possession as well as for other property."

Argument.

These bondsmen are sued on a contract which engages them to answer for the performance of the duty of the guardian *according to law;* this contract does not refer to any arbitrary legislation which the State of Maryland may chose to enact, but to any law which in its sovereign capacity but as a member of the Federal Union it may constitutionally enforce.

The Constitution of the United States is the *supreme* law of the land and if any statutory regulation in Maryland conflicts with this the statute is not *law*, and it is no part of the duty of the guardian to comply with it; "according to law" in the contract means "according to law," considering the Constitution of the United States as the supreme law.

THE SCHEME OF TAXATION OF THIS PROPERTY DEVISED BY THE LAWS OF MARYLAND WAS IN CONFLICT WITH THE FEDERAL CONSTITUTION.

The property was absent, the owner was absent, the custodian was absent, the principal was not the lawful custodian by virtue of his guardianship, but by virtue of an agreement between him and the adult owner (Printed Record, p. 16).

This property not being within the State, and therefore not within reach, it was assessed by virtue of a special provision applicable to property, *not actually in the hands of guardians as such*, but *which shall appear by the records of the Orphans' Court* to be in the hands of the guardian as such (Sec. 9, *supra*).

This statute does not by its terms provide for any notice, and it makes the records of the Orphans' Court the basis of taxation, and requires *all* such property to be assessed. If the property appears by the records of the Orphans' Court to be in the hands of the guardian it becomes assessable under this statute. Whether inside or outside of the State, whether the property of infant or adult, whether belonging to resident or non-resident, the sole basis of taxation is the appearance of the records of the Orphans' Court.

The Court of Appeals, in its opinion, says :

> " The only other question that we need refer to, is the constitutionality of the tax, thus, levied on the property " (Printed Record, p. 46). " We of course, do not question the decisions of the Supreme Court of the United States, cited by the appellant, as to the right of a State to tax property outside of the limits when the owner is beyond its jurisdiction, but we do not deem them applicable to this case " (Printed Record, p. 47).

The fact that the Court of Appeals did not deem that the cases cited were applicable to the case was merely an adverse determination of our contention that they were applicable. It should not preclude us from examining into whether they were right.

The ground of the Court's determination, as stated in the opinion, that they would not enter into an extended discussion of the constitutional questions attempted to be raised, because they had recently determined that the *situs* of the property was in Washington County (Printed Record, pp. 45, 47), and had no

reason to change their views, was a determination of law and not of fact. They refer to their opinion in the case of Baldwin vs. County Commissioners, 85 Md., 145, as an expression of their present views. In that case they said (p. 155) that both guardian and ward were non-residents at the time of the levy and assessment; that the property consisted of stocks and bonds of corporations organized and located outside of the State of Maryland, and that the *situs* of property of this kind, for the purposes of taxation, is ordinarily at the domicile of the owner, but that the Legislature has the power to fix a different *situs*, provided, of course, there be no conflict with some provision of the Constitution (p. 156). They now have had their attention called specifically to the provisions of the Constitution, and they state that they have no reason to change their views.

ABSENT PROPERTY OF A NON-RESIDENT IS NOT TAXABLE.

THE STATE OF MARYLAND, under the repeated decisions of this Court, could not lawfully tax the absent property of a non-resident.

The leading cases are:

NORTHERN CENTRAL RAILWAY CO. VS. JACKSON, 7 WALL., 262: Here the Northern Central Railway Co. sought to withhold from a bondholder a tax imposed by the State of Pennsylvania upon the coupons attached to the bonds and directed by the law of Pennsylvania to be deducted by the railway company from interest payments; the bonds were issued upon the credit of the line of road, partly in Maryland and partly in Pennsylvania; a portion of the pledged property lay in Maryland. NELSON, J., delivering the opinion of the Court, said:

> "Now, it is apparent, if the State of Pennsylvania is at liberty to tax these bonds, that, to the extent of this Maryland portion of the road, she is

taxing property and interests beyond her jurisdiction ; * * * to permit the deduction of the tax from the coupons in question would be giving effect to the acts of the Legislature of Pennsylvania upon property and interests lying beyond her jurisdiction."

CLEVELAND, PAINESVILLE AND ASHTABULA R. R. Co. vs. COMMONWEALTH OF PENNSYLVANIA, 15 Wall., 300 (State tax on foreign-held bonds): Here the railroad company, a corporation of Pennsylvania, and subject to its tax laws, was directed to deduct from interest payments on its bonds held and owned by non-residents, a tax assessed and levied upon the principal of the bonds by the State of Pennsylvania. The Court, FIELD, J., criticised the language of NELSON, J., in the last case cited above, but affirmed the principle of the decision, using the following words :

" It was the fact that the *bonds were held by a non-resident*, which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned Justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the State is not a subject upon which her taxing power can be legitimately exercised. *Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.* The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the State. These subjects are persons, property and business. Whatever form taxation may assume—whether as duties, imposts, excises or licenses—it must relate to one of these subjects. It is not possible to conceive of any other, though, as applied to them,

> the taxation may be exercised in a great variety of ways. It may touch property in every shape—in its natural condition, in its manufactured form and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted—in professions, in commerce in manufacture and in transportation. Unless restrained by provisions of the Federal Constitution, the power of the State, as to the mode, form and extent of taxation, is unlimited where the subjects to which it applies are within her jurisdiction."

From the foregoing opinion it is clear that person, property or business within the State are jurisdictional facts, and that no tax can be laid where the presence of one or the other cannot be predicated. Applying the principles to the facts of the case, the Court said:

> "We are clear that the tax cannot be sustained; that the bonds, being held by non-residents of the State, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the State."

NEW YORK, LAKE ERIE AND WESTERN R. R. CO. vs. COMMONWEALTH OF PENNSYLVANIA, 153 U. S., 628: Here the State of Pennsylvania sought to collect from a New York corporation taxes on bonds of the corporation held and owned by residents of Pennsylvania. The same general principle is enunciated again by the Court, through HARLAN, J., in these words:

> "No principle is better settled than that the power of a State, even its power of taxation in respect to property, is limited to such as is within its jurisdiction."

In City of St. Louis vs. The Wiggins Ferry Company, 11 Wall., 423, Mr. Justice SWAYNE said:

> "Where there is jurisdiction neither as to person nor property, the imposition of a tax would be *ultra vires* and void. If the Legislature of a State should enact that the citizens or property of another State or country should be taxed in the same manner as the persons and property within its own limit and subject to its authority, or in any other manner whatsoever, such a law would be as much a nullity as if in conflict with the most explicit constitutional inhibition. Jurisdiction is as necessary to valid legislative as to valid judicial action."

The same principles are stated in Tappan vs. Merchants' Bank, 19 Wall., 490; Gloucester Ferry Co. vs. Pennsylvania, 114 U. S., at p. 208, and City of New Orleans vs. Stemple. Advance sheets U. S. Supreme Court, decided December 4, 1899.

This Court has also denied the power of a State to impose a personal liability for taxes upon a non-resident. Section 65 of the tax law attempted this.

See Dewey vs. Des Moines, 173 U. S., 193, where Mr. Justice PECKHAM said:

> "The State may provide for the sale of the property upon which the assessment is laid, but it cannot under any guise or pretense proceed farther and impose a personal liability upon a non-resident to pay the assessment or any part of it. To enforce an assessment of such a nature against a non-resident, so far as his personal liability is concerned, would amount to the taking of property without due process of law, and would be a violation of the Federal Constitution."

The numerous cases in which the principles of these

decisions have been cited and applied will be found collected in

6 Rose, Notes on U. S. Reports, 970 *et seq.*
7 Rose, Notes on U. S. Reports, 892 *et seq.*
8 Rose, Notes on U. S. Reports, 259 *et seq.*

The Court of Appeals of Maryland has sustained the power of the State to levy and collect the taxes upon the proposition expressed in its opinion (on printed p. 47) in the following words: "In contemplation of law, the personal property remains in the county where the guardian was appointed."

The Property Taxed Was Absent Property of a Non-Resident.

It must be remembered that this property was the property of the ward, and that the ward had arrived at full age; that the property was actually, by every conception of law, located in New York State, and that, under the cases just cited, it is only taxable where it is or where the owner is, and that any other contemplation of law is a fiction and a device for taxing property over which the State has no jurisdiction.

Now, the Court of Appeals sought to distinguish the Federal cases above cited as inapplicable, on the ground that in the present case the property taxed was taxable property, because the Legislature had fixed its *situs* in Maryland, but we respectfully urge that this does not avoid nor answer the question: *Was its situs actually in Maryland?*

We contend that, on the facts, the question of *situs* is one of law.

In State Tax on Foreign Bonds, 15 Wall., 300, the Supreme Court of Pennsylvania had determined that the *situs* of the property for the purposes of taxation was in Pennsylvania, but that did not prevent this Court from determining that it was not; the question of *situs* on undisputed facts was one of law and not of fact (See opinion of Mr. Justice Field, pp. 321 and 322).

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There are a few additional considerations which seem to us to throw some light on the constitutional soundness of the proposition advanced by the Court of Appeals that this property was taxable in Washington County because its *situs* was there.

Let us consider what was taxed: It was the *property*, because under Section 65, already quoted, the guardian is allowable in his accounts on settlement with the ward for taxes paid, while Section 9 specifically declares "*such property*" to be taxable.

Under the principles laid down in the opinion of Mr. Chief-Justice FULLER in Pollock vs. Farmers' Loan and Trust Co., 157 U. S., at 581 *et seq.*, the tax payable by the guardian is a tax on the ward's property, the variation of the form not being a variance of the substance.

In United States vs. Baltimore and Ohio Railroad Company, 17 Wall., 322, Mr. Chief-Justice HUNT said:

> "A tax is understood to be a charge, a pecuniary burden, for the support of Government. Of all burdens imposed upon mankind that of grinding taxation is the most cruel. It is not taxation that Government should take from one the profits and gains of another. That is taxation which compels one to pay for the support of the Government from his own gains and of his own property.
>
> "In the cases we are considering the Corporation parts not with a farthing of its own property. Whatever sums it pays to the Government is the property of another. Whether the tax is five per cent. on the dividend or interest or whether it be fifty per cent. the Corporation is neither richer or poorer. Whatever it thus pays to the Government it by law withholds from the creditor. If no tax exists, it pays seven per cent., or whatever be its rate of interest, to its creditor in one unbroken sum. If there be a tax it pays ex-

actly the same sum to its creditor, less five per cent. thereof, and this five per cent. it pays to the Government. The Receivers may be two, or the Receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the Corporation, and no taxation of the Corporation. The burden falls on the creditor. He is the party taxed."

The method of taxation adopted was, therefore, under the decisions above cited, merely a convenient mode of collecting a tax from Columbus C. Baldwin, an adult resident of New York on New York property.

All constitutional taxes must be based on presence of property, presence of its owner, or the use of a privilege. If either of these bases exists, the State may lawfully tax. The law itself taxes the *property*, and the Court of Appeals has determined the *property* to be taxable; while the owner is not within the State and there is no pretense that the tax was a privilege tax; so we may safely consider that this tax is justified by its advocates simply on the ground that it is a tax on *property*, which for the purposes of taxation is within reach of the State of Maryland.

But what is the property? It is stocks and bonds of foreign corporations, and, therefore, not by virtue of any corporate peculiarities amenable to the State of Maryland. The bonds are debts taxable in the hands of their holders (State Tax on Foreign Held Bonds, 15 Wall., 300). Whose is the property? It is actually outside of the State of Maryland; it is owned by an adult resident of the State of New York. Considered as *property*, how can the State of Maryland tax it? What right has the guardian with respect to it? Who is entitled to it? The property clearly belonged to Columbus C. Baldwin, a resident of New York, and it was, in fact, in New York. His legal rights with respect to it were all those of owner. Even the Courts of Maryland admit this.

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In Green vs. Johnson, 3 G. & J., at p. 395, DORSEY, J., said:

> "As soon as a trust ceases to be a subsisting trust or expires by its own limitation, or is put an end to by the act of the parties, if it be a fit subject for a suit at law a cause of action arises and the statute of limitations begins to run. The moment a ward is emancipated from the authority of his guardian by reaching the age prescribed by law his cause of action is complete. The relation which existed between them ceases to be a subsisting trust; an action of account may be immediately instituted in a court of law, and from that time the act of limitation dates the commencement of its operation."

And in State use of Henderson vs. Henderson, 54 Md., at p. 344, IRVING, J., said:

> "From the moment the ward reaches the age when the law makes him free, what the guardian owes the ward becomes a debt for which he may immediately sue. All money due him and property belonging to him are from that moment legally demandable, and he may sue the guardian on his bond for its payment and delivery."

The emancipation spoken of takes place when the ward reaches the age of twenty-one.

Md. Code of Public General Laws, Art. 81, S. 144.

> "Whenever land shall descend or be devised to a male under the age of twenty-one years, or to a female under the age of eighteen years, or any such male or female shall be entitled to a distributive share of the personal estate of an intestate, or to a legacy or bequest under a last will or codicil, or may acquire any real or personal property or estate

by gift or by purchase, and the said male or female shall not have a guardian appointed by last will and testament, agreeably to law, the Orphans' Court of the county in which such infant shall reside shall have power to appoint a guardian to such infant UNTIL THE AGE OF TWENTY-ONE YEARS IF A MALE, and until the age of eighteen if a female or married."

While the property is the ward's from the beginning, it is rightfully in the custody of the guardian until the ward arrives at age; but thereafter, immediately, whether there is an account or not, both the title and right to possession belong to the ward, and he may maintain an action for the property *in specie* or against the guadian for an accounting, and is, therefore, not dependent upon the Orphans' Court of Washington County for the protection of his rights.

State use of Henderson vs. Henderson, 54 Md., 354.
Green vs. Johnson, 3 G. & J., 396.
State vs. Murray, 24 Md., 310.
Slusher vs. Hammond (Iowa), 63 N. W. Rep., 185.
Reeve, Domestic Relations, 4th Ed., p. 399.
Schouler, Domestic Relations, S. 311, 3d Ed.
9 Am. & Eng. Enc. of Law, 148, 1st Ed.

The guardian may have certain duties to perform in view of his office as guardian, but those duties do not in any respect change the actual fact that the property was the property of Columbus C. Baldwin, a resident of New York, and that, considered from the standpoint of its location and its ownership, it was New York property, and *as property* not taxable in the State of Maryland.

THE CASE IS WITHOUT PRECEDENT.

Another sidelight on the proposition is that the two cases of *Baldwin vs. County Commissioners*, 85 Md., and the present case, stand alone. No authorities on taxation which we have found sustain them.

See

Cooley, Taxation, second Ed., p. 377.
Dallinger vs. Rapello, 14 Fed. Rep., 32.
25 Am. & Eng. Enc. Law, 129.
Trustees of the Academy of Richmond County vs. City Council of Augusta, 20 Lawyers' Reports Annotated, 151, note.

Substantially the same proposition was presented in City of Augusta vs. Kimball, 91 Me., 605 (June 17, 1898) (41 L. R. A., 475), and decided in conformity with with our contention. We refer especially to the opinion of that Court (EMERY, J.) as aptly stating and sustaining by its argument our position here.

THERE WAS NO NOTICE OR OPPORTUNITY TO BE HEARD.

The Court of Appeals in its opinion indicates that the only notice required by the law to be given is in case of an increase of assessment, or adding new property (Printed Record, p. 46), but it is not contended that this was a case of an increase of assessment or the adding of new property; on the contrary, it was the assessment of property outside of the jurisdiction; it may not have been added nor its assessment increased; in fact, there is no ground for contending that it fell under either of these two heads. Except for this notice, the law provides no other notice, but enables the officers to act direct on the returns of the Register of Wills.

There was in fact no notice of the assessment. The principal, being a nonresident and not having property within the State, was not chargeable with notice of the statute law concerning taxation.

The cases in this Court on the subject of notice of taxation are collated in MERCHANTS' AND MANUFACTURERS' NATIONAL BANK VS. PENNSYLVANIA, decided May 24, 1897, in which it is stated that statutory notice of *time* and *place* of assessment with a right to be heard before the assessing officer is *due process of law*. It would follow that absence of the right is not *due process of law*.

In a note to HAGAR VS. RECLAMATION DISTRICT, No. 108, 111 U. S., 701, Mr. Justice FIELD has collated the leading decisions upon the necessity of notice and an opportunity to be heard, and this Court undoubtedly agrees with the cases cited upon the necessity of notice and an opportunity to be heard to constitute taxation due process of law.

So this case presents the picture of two non-residents, taxed on absent property, by legislative fiction, without any previous notice or any hearing, or right to a hearing, before any tribunal whatsoever, empowered to give ear to their particular objection—namely, that the property shown on the records of the Orphans', Court is not taxable in Washington County, nor in Maryland. The law (Sec. 9) settles that fact arbitrarily and absolutely, and ascertains the amount subject to tax with equal rigidity and absoluteness; and the tax, when paid, is allowed to the guardian out of the ward's property.

This procedure is contrary to the leading cases of:

The Railroad Tax Case, 13 Fed. Rep., 751.
Stuart vs. Palmer, 74 N. Y., 188.
Scott vs. Toledo, 36 Fed. Rep., 385.
Hagar vs. Reclamation District, 111 U. S., 701, note.

Undoubtedly some reference will be made now by the defendant in error to the fact that the Court of Appeals in a previous case involving the taxation of this same property determined as matter of law that this property was taxable in the State, but that determination was not *res judicata* in this action; the

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former action was not between the same parties; it was a suit for injunction to restrain the collection; the decree was merely a decree of dismissal, and whatever was said in the opinion concerning the reason for dismissal was matter of law and not of fact. The former case came to this Court and the appeal was dismissed for want of jurisdiction, but that does not preclude the Court from now examining the questions of law when they are properly presented in a suit for a different purpose between parties, both of whom were not parties to the former action. This question is fully discussed in our brief in opposition to dismissal of the present Suit, page 8, *et. seq.*, to which we now refer.

Conclusion.

We maintain that

A. The law failed to provide for any notice, or hearing, that there was no actual notice, that the plaintiffs in error being made answerable for taxes, levied solely on the appearances of the books of the Register of Wills, are deprived of property without due process of law, and

B. The State of Maryland by the law in question as interpreted by the Court of Appeals has taxed property entirely outside its jurisdiction; that such law for that reason deprives the plaintiffs in error of property without due process of law.

We respectfully submit that the judgment should be reversed.

CHARLES A. BOSTON,
Counsel for Plaintiffs in Error.